IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 962 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VIJAYSINH CHANDUBHA JADEJA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 962 of 1999

MR DEEPAK M SHAH for the appellant

Ms. B.R. Gajjar, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 21/10/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

1. The original accused of Sessions Case No. 69 of

1998 has, by filing this appeal under Section 374(2) of the Code of Criminal Procedure, ('Cr.P.C.' for short), read with Section 36-B of the Narcotic Drugs and Psychotropic Substances Act, 1985, challenged the correctness and legality of the judgment Exh.53 dated 9th July 1999 rendered by the learned Additional Sessions Judge, Rajkot, who presided over the Special Court constituted under Section 36-A of of the Narcotic Drugs and Psychotropic Substances Act, 1985, [hereinafter referred to as 'the learned Judge of the trial court'] in the aforesaid Sessions Case No.69 of 1998, by which, the appellant has been convicted under Section 235(2) of Cr.P.C. for an offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and was sentenced to undergo simple imprisonment for ten years and to pay fine of Rs.1 lakh and, in default of fine, to undergo further simple imprisonment for one year.

2. The facts leading to filing of this present appeal in a nutshell are as follows:

3. On or about 14th February 1998, the complainant, Police Jamadar, Nanjibhai Ramjibhai Pargi (since deceased), who was present, on duty, in Rajkot City 'A' Division Police Station, received a secret information from the informant to the effect that one Vijaysinh Chandubha Jadeja (appellant), resident of Ranchhodnagar Society, Rajkot, was selling brown sugar in small packets illegally in Bangadi Bazar, at Rajkot, and that, at the time of giving the information, he was continuing to sell the contraband article. By that information, it was further informed that that person was wearing white clothes. On receipt of the said information, Nanjibhai made an Entry No.15 of 1998 (Exh.27) in the Station Diary of 'A' Division Police Station of Rajkot at 13.30 hrs. He, by sending a copy of that entry, informed the Assistant Police Commissioner of Eastern Region of Rajkot He also wrote a yadi (Exh. 17) to the Scientific Officer of the Forensic Science Laboratory ['FSL' for short) requesting the said Scientific Officer to join him during the course of the raid and search at the place stated in the information. Thereafter, Nanjibhai sent one Police Constable, P.W.3, Janaksinh Gajubha Rana, to call two persons to act as independent panch witnesses. Thereupon, P.W.1 Shri Bhaskarbhai Bhagwanjibhai Dave and another person, P.W.2 Shri Sahadevsinh Ajitsinh Jhala, came to the police station. Nanjibhai gave introduction of the Scientific Officer, Shri Gameti and other police personnel, who were present in the Police Station, to the panch witnesses. Thereafter, a preliminary panchanama

was drawn in between 14.10 hrs and 14.30 hrs in the police station and, at that time, search of the police personnel and panch witnesses was made inter-se, but no contraband article was found from anybody. For this, one Entry No.16/98 was made in the Station Diary of the Police Station before they left the Police Station. Thereafter, Nanjibhai, in the company of P.W.3, Janaksinh Gajubha, Police Constable, Bharatsinh Pratapsinh, P.W.4, Police Constable, Haresh Maganlal, P.W.6, Scientific Officer, Shri A.L. Gameti, and other police personnel and the panch witnesses, left the police station for Bangadi Bazar, at Rajkot, on foot. When they reached Bangadi Bazar, they saw one person resembling the identification of the person given in the information was found standing in Sankadi Sheri known as Sheri of Hanumanji Temple. Immediately that person was cordoned by the police personnel and, on making interrogation of that person, that person stated his name to be Vijaysinh Chandubha Jadeja, resident of Ranchhodnagar, Rajkot, (who is the present appellant). Nanjibhai and other police personnel gave their introduction to the appellant. Nanjibhai, in the presence of the panch witnesses, informed the appellant that they had received an information that he was having brown sugar with him. He was asked as to whether he was required himself to be searched in presence of either a Gazetted officer or a Magistrate. The appellant declined for such search to be in presence of either a Gazetted officer or a Magistrate, and he informed that he had no objection if the police would take his search. Thereupon, in the presence of the panch witnesses, Nanjibhai searched the "person" of the appellant and, as a result of such search, one small packet wrapped in the white paper was found from the pocket of bush-shirt worn by the appellant. On opening that packet, it was found that there was some brown coloured substance in that packet. That substance was smelt by Nanjibhai, other police personnel and panch witnesses and it was found that it was emitting a peculiar smell. At that time, at the place of search P.W.6, Scientific Officer, Shri A.L. Gameti, of FSL, was also present. He, with the help of Drug's Detection Kit, analysed that substance and, prima facie, it was fund that that powder was brown sugar. Shri Gameti issued a certificate (Exh.25) for having examined that substance on the spot. Thereafter, Nanjibhai sent Police Constable, Haresh Maganbhai, to call one gold-smith with scale and measurement weights. He called P.W.5, Virendra Sukhlal Tolia from Soni Bazar, Rajkot. He came with scale and weight measurements and he weighed that substance found from the packet which was found from the pocket of bush-shirt worn by the appellant. By weighing

that article, it was found that the said article was weighing 1350 milligrams. Nanjibhai obtained a certificate from P.W.5, Virendra Sukhlal Tolia. That substance was valued approximately to the tune of Rs.13,500/-. Thereafter, Nanjibhai seized that article in the presence of the panch witnesses and, thereafter, that article was duly packed and sealed in the presence of the panch witnesses. The seal of the Police Inspector, Rajkot City, was put on that packed article. During the course of search of person of the appellant, cash amount of Rs.480 was found from the appellant. It is the case of the prosecution that this amount was an amount recovered by the appellant by selling that brown sugar. That article was seized under a panchanama. That panchanama was drawn below an earlier preliminary panchanama. That panchanama was completed at about 15.40 hrs.

3.1 Thereafter, Nanjibhai brought that seized article along with custody of the appellant to 'A' Division Police Station, Rajkot, and handed over that article to PW 7, Police Station Officer, Shri Ajitsinh Ramsinh, at 16.50 hrs. He also lodged the complaint against the appellant in the Police Station. That complaint came to be registered as CR No.5 of 1998. The PSO of the Police Station entrusted the investigation of that case to PW 11, Pruthvisinh Vaghajibhai Parmar. He recorded statements of witnesses, who were conversant with the facts of the case. The muddamal article was sent to the FSL. On receipt of the report from the FSL, Mr. Parmar filed chargesheet against the appellant in the Special Court constituted under the NDPS Act, on 2nd May 1998. That chargesheet came to be registered as Sessions Case No. 69 of 1998.

4. The learned Judge of the trial court framed charge Exh.1 against the appellant on 9th June 1998, which was read over and explained to him. The appellant pleaded not guilty and claimed to be tried. To prove the charges framed against the appellant, the prosecution examined in all eleven witnesses: (1) P.W.1, Bhaskarbhai Bhagwanjibhai (panch witness) Exh.6; (2) P.W.2, Sahadevsinh Ajitsinh (another panch witness) Exh.7; (3) P.W.3, Janaksinh Gajubha, Exh.8; (4) P.W.4, Haresh Maganlal, Exh.22; (5) P.W.5, Virendra Sukhlal (gold-smith), Exh.23; (6) P.W.6, Ajitbhai Laljibhai Gameti (Scientific Officer) Exh.24; (7) P.W.7, Ajitsinh Ramsinh,Exh.26; (8) P.W.8, Raidhanbhai Kanabhai, Exh.31; (9) P.W.9, Bijubha Jilubha, Exh.32; (10) P.W.10, Shailendragiri Fulgiri, Exh.34 and (11) P.W.11, PSI,

Pruthvisinh Vaghajibhai Parmar, Ex.36. The prosecution also produced documentary evidence against the appellant such as panchanama Exh.9, report dated 17.2.1998 of Nanjibhai made to Senior PSI of 'A' Division Police Station, Rajkot, Exh.10., yadi of Nanjibhai presented to PSO of Police Station with which he produced the muddamal article as well as custody of the appellant Exh.11, order of the PSO of the Police Station given to the PSI, Mr. P.V. Parmar, by which investigation was entrusted to him, (Reverse side of Exh.11), written information given by Nanjibhai to the appellant in compliance of Section 50 of the NDPS Act, Exh.12, information given by Nanjibhai to Assistant Police Commissioner in compliance of Section 57 of the NDPS Act Exh.13, information given to the immediate superior officer of Nanjibhai with regard to information received by him Exh.16, yadi written to the Scientific Officer of FSL, Rajkot, requesting him to attend the police station Exh.17, certificate given by gold-smith for weighing the muddamal article Exh.20, written information stating grounds of arrest given to the appellant Exh.21, report of FSL Exh.25, bunch of two Entry Nos. 15 and 16 from the Station Diary of the Police Station Exh.27, Entry Nos. 17 and 18 from the Station Diary of the Police Station Exh.28 and 29 respectively, forwarding letter with which muddamal article was sent to the FSL Exh.37, receipt issued by the FSL for having received the muddamal article along with the report of the FSL, Exh.38 etc. to prove the charge against the appellant. On completion of evidence led by the prosecution, the learned Special Judge questioned the appellant and his statement came to be recorded under Section 313 of the Cr.P.C.. The defence of the appellant was of complete denial of the prosecution case. The appellant neither examined any witnesses in his defence nor produced any documentary evidence. The defence lawyer submitted written arguments Exh.52.

5. The learned Judge of the trial court, after analysing and appreciating the oral as well as documentary evidence and after hearing the arguments advanced by the learned advocates for the parties, came to a conclusion that on 14th February 1998 at about 14.45 hrs, the accused was found with conscience and actual physical possession of contraband article, namely, brown sugar, weighing 1350 milligrams in Sankadi Sheri, near Bangadi Bazar, Rajkot, He further came to the conclusion that the appellant has contravened the provisions of Section 8 of the NDPS Act. This contravention is punishable under Section 21 of the NDPS Act. He, therefore, by rendering his judgment Exh.53 on 9th July 1999, in the aforesaid Sessions Case No.69 of 1998,

convicted the accused under Section 235(2) of Cr.P.C. for an offence punishable under Section 21 of the NDPS Act, and imposed sentence as stated in paragraph 1 hereinabove.

6. Being aggrieved against and dissatisfied with the said judgment, the appellant has preferred this present appeal.

7. We have heard learned advocate Shri D.M. Shah for the appellant and learned Additional Public Prosecutor, Ms. B.R. Gajjar, for the respondent-State. Learned advocate, Mr. D.M. Shah, for the appellant, has taken us through the entire oral as well as documentary evidence on record. He has also taken us through the impugned judgment challenged in this appeal.

8. Learned advocate, Mr. D.M. Shah, for the appellant, has argued that, in this case, 'person' of the appellant was searched and, therefore, the raiding officer was required to comply with the mandatory provisions of Section 50 of the NDPS Act. He has argued that, looking to the evidence on record, the provisions of Section 50 of the NDPS Act are not complied with and, in view of this, when there is breach of the provisions of Section 50 of the NDPS Act, the trial is vitiated and, therefore, the appellant is required to be acquitted by allowing this appeal. He has further argued that there is no direct evidence or corroborative evidence led by the prosecution on the point with regard to compliance of Section 50 of the NDPS Act. He has further argued that the independent panch witnesses have not supported the case of the prosecution and they were declared hostile witnesses by the prosecution. He has further argued that in this case, except the police officers, no evidence of independent witness is produced. Scientific Officer, Mr. Gameti, who can be said to be an independent witness, has not supported the case of the prosecution with regard to compliance of Section 50 of the NDPS Act and, therefore, this is a case in which the benefit of doubt should be given to the appellant. He has further argued that this case is of 1998 and, for the last four years, the appellant is in jail and, looking to the quantity of the muddamal article, the appellant deserves to be acquitted, as there is a reasonable doubt with regard to compliance of Section 50 of the NDPS Act. In support of his submissions, he has cited a decision of Jagdishsinh vs. State of Madhya Pradesh, reported in AIR 2002 Supreme Court 2540.

9. In reply to the arguments advanced by learned

advocate,Mr. D.M. Shah, learned APP, Ms. B.R. Gajjar, has argued that, in this case, the prosecution has led ample evidence to show that the whole procedure laid down in the NDPS Act was followed and all the relevant documentary evidence was led to prove that all the necessary provisions of the NDPS Act were complied with. She has further argued that, though the panch witnesses have not supported the case of the prosecution, the prosecution has proved the case by examining the police personnel who were present throughout the raid and search of person of the appellant. The police personnel had no enmity against the appellant and, therefore, they had no reason to depose against him. She has further argued that all the provisions of the NDPS Act in general and the provisions of Section 50 of the NDPS Act in particular were fully complied with by the raiding officer and, looking to the evidence led by the prosecution, this appeal deserves to be dismissed. In support of her submissions, she has placed reliance on the following judgments:

(i) 2000(2) SCC 592 [Ashokkumar vs. State of Haryana]

(ii) 1998 Criminal Law Journal 132 [Ayub vs. State of Rajasthan]

10. We have considered the rival submissions made by both the parties. We have carefully examined and reappreciated the evidence on record. We have also taken into consideration the reasons given by the learned Judge of the trial court to hold the appellant guilty for the offence punishable under Section 21 of the NDPS Act.

11. In this case, Nanjibhai Ramjibhai Pargi, Police Jamadar of 'A' Division Police Station, Rajkot City, was an Officer under Section 42(1) of the NDPS Act. He received a secret information from the informant to the effect that one person, namely, Vijaysinh Chandubha Jadeja, resident of Ranchhodnagar Society, Rajkot, was selling small packets of brown sugar in Bangadi Bazar, at Rajkot, and that he was wearing white clothes. Immediately on receipt of the said information, an Entry no.15 (13.30 hrs) was made in the Station Diary of the Police Station. A true copy of that Entry No.15/98 is produced at Exh.27 and, thus, the statutory requirement of reducing the information in to writing as per Section 42(1) of the NDPS Act was complied with. As per sub-section (2) of Section 42 of the NDPS Act, Nanjibhai, who was authorised officer under Section 42(1) of the NDPS Act was required to send a copy of information which he received and reduced in to writing to his immediate official superior. The prosecution has produced office

copy of the information given by Nanjibhai to his immediate official superior, Assistant Police Commissioner, at Exh.16. There is no serious dispute with regard to compliance of Section 42 of the NDPS Act. As stated earlier, on receipt of the aforesaid information, Nanjibhai called two independent persons to act as panch witnesses. He also called the Scientific officer of the FSL so as to enable the Scientific Officer to primarily analyse the article which might be recovered and seized on the spot. For this, he wrote a yadi Exh.17. On receipt of the said yadi, P.W.6, Mr. Gameti, came to the Police Station. Necessary introduction was given to the panch witnesses, of the members of the raiding party including the Scientific Officer Mr. Gameti inter-se and even the search was made of each other in presence of the panch witnesses. Nothing was found from anybody. For this procedure, which Nanjibhai followed in the Police Station, he drew a preliminary panchanama (former part of Exh.9 during the period between 14.10 and 14.30 hrs) before leaving the police station for the place of destination as per the information received by Nanjibhai. Entry no.16/98 (14.35 hrs) was made in the Station Diary. This Entry No.16 is at the second part of Exh.27. The raiding officer, Nanjibhai, in the company of panch witnesses, the Scientific Officer of the FSL, and the members of the raiding party, left the Police Station on foot for Bangadi Bazar at 14.35 hrs. On reaching that place, they found that one person was standing in Sankadi Sheri known as Sheri of Hanumanji Temple. Nanjibhai found that that person was resembling as per the description of the person given in the information and, therefore, immediately the members of the raiding party cordoned that person. Thereafter, in the presence of the panch witnesses, Nanjibhai asked the name and address of that person. That person stated that he was Vijaysinh Chandubha Jadeja, resident of Ranchhodnagar, Rajkot. He is the appellant before this Court. Thereafter, in the presence of the panch witnesses, Nanjibhai gave his introduction to the appellant and informed him that he had intoxicant substance like brown sugar with him for which a definite information had been received by the police and for that he was required to be searched. Thereafter, for making the compliance of Section 50 of the Act, Nanjibhai asked the appellant as to whether he wanted himself to be searched in presence of either a Gazetted Officer or a Magistrate, and that necessary arrangement would be made as per the desire of the appellant. Thereupon, the appellant informed that he did not want himself to be searched in presence of either a Gazetted Officer or a Magistrate and further informed

that he might be searched by the police. For compliance of Section 50 of the NDPS Act, a written information was given to the appellant. Office copy of that information is at Exh.12. It was signed by the appellant. Below this information Exh.12, the appellant, in his own handwriting, had written that he has no objection or dispute if the police takes his search and, below this endorsement written by him, the appellant had signed. To prove this information Exh.12 given to the appellant, the prosecution has examined P.W.3 Police Constable, Janaksinh Gajubha, Exh.8. He had accompanied Nanjibhai throughout the raid and search of the appellant right from his presence in the Police Station when Nanjibhai received the secret information at about 13.30 hrs to completion of procedure of seizure of article from the appellant under the panchanama, namely, second part of Exh.9. For compliance of Section 50 of the NDPS Act, this witness, Janaksinh Gajubha, has deposed in his evidence that, after asking for the name and address of the appellant, Nanjibhai informed the appellant that he had brown sugar with him. Nanjibhai also asked the appellant as to whether he wanted himself to be searched in presence of either a Gazetted Officer or a Magistrate, and, thereupon, the appellant said: 'no'. He has produced the documentary evidence Exh.12 which was given to the appellant in compliance of Section 50 of the NDPS Act.

12. The fact with regard to compliance of Section 50 of the NDPS Act is reflected in the panchanama Exh.9 which was prepared below the preliminary panchanama. Likewise, that fact is also reflected in the complaint Exh.10, which is proved by P.W.3, Janaksinh Gajubha, Exh.8. Shri D.M. Shah, learned advocate for the appellant, has argued that not a single independent witness has, by giving evidence, corroborated the evidence given by P.W.3, Janaksinh Gajubha, Exh.8, on the point with regard to compliance of Section 50 of the NDPS Act. Here, in this case, to prove the panchanama Exh.9, two panch witnesses have been examined - one is P.W.1, Bhaskarbhai Bhagwanjibhai Exh.6 and another is P.W.2, Sahadevsinh Ajitsinh Exh.7. Both the panch witnesses have been declared hostile witnesses by the prosecution as they have not supported the case which is advanced by the prosecution by way of the panchanama Exh.9. The prosecution mainly relied on two police witnesses - one is P.W.3, Janaksinh Gajubha, Exh.8, and another is P.W.4, Haresh Maganlal, Exh.22. These two police witnesses had accompanied the raiding officer, Nanjibhai, right from receiving the secret information till the panchanama was completed. Shri D.M. Shah has argued that these two

police witnesses are interested witnesses and, therefore, their evidence cannot be relied upon blindly without corroboration from an independent witness. In an unreported decision of the Division Bench of this Court (Coram: J.M. Panchal & J.R. Vora, JJ.) in Criminal Appeal No.12 of 2002 decided on 5th/6th February 2002 [Raghubhai Gandabhai Bharwad vs. State of Gujarat], it has been observed in paragraph 18 as follows:

> "We further find that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over board as unreliable. It must be realised that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it."
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> In the aforesaid decision, the Division Bench has also referred to the judgment of the Supreme Court in the case of Aher Raja Khima vs. State of Saurashtra, AIR 1956 Supreme Court 217, wherein, it is ruled that the presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. What is laid down for the guidance of the courts is that the attitude to distrust and suspend a police officer without good ground, therefore, could do neither credit to the magistracy, nor good to the public and it can only run down the prestige of the police administration.

13. We have carefully examined the evidence of P.W.3, Janaksinh Gajubha, Police Constable Exh.8, and P.W.4, Haresh Maganlal, Police Constable Exh.22, and we find that their evidence is trustworthy and dependable. There is no reason to disbelieve the evidence of these two witnesses merely because they are police witnesses. No suggestion is put in cross examination of these two witnesses by the defence lawyer of the accused as to why these two witnesses have deposed against the accused. If we examine the evidence of P.W.6, Ajitbhai Laljibhai Gameti (Scientific Officer, FSL) Exh.24, we find that he has corroborated the evidence of these two police witnesses on the point with regard to the facts stated in the preliminary panchanama as well as the procedure followed at the place where the appellant was raided and searched. P.W.6, Ajitbhai Laljibhai Gameti, is not a police witness. He is, as per the learned Judge of the trial court, a Gazetted Officer of another department and, in his presence, the police had seized a small packet of brown coloured powder. As he received a yadi

Exh.17 from Nanjibhai, he immediately went to the Police Station by taking with him examination kit and file and, in his presence, the preliminary panchanama was prepared. He has further deposed that he, in the company of Shri Pargi and other police personnel and panch witnesses, left the Police Station to go to Bangadi Bazar on foot. He has further deposed that there are some cutlery shops in Hanuman Sheri at Bangadi Bazar and one person by name Vijaysinh, i.e. the present appellant, was asked to halt then and there and, thereafter, the interrogation was made to the appellant. He has further deposed that Head Constable, Pargi, seized one small packet of brown coloured powder from the appellant. Head Constable, Pargi, whose name he has referred to in his evidence was Nanjibhai Ramjibhai Pargi, who was the raiding officer. He has further deposed that he made preliminary examination of that substance and he found that it was brown sugar. Thereafter, he issued a certificate with regard to preliminary examination of the substance which he made on the spot at Exh.25. He also corroborated the evidence of two police witnesses on the point that the substance was weighed and it was found that the substance was weighing 1350 milligrams. He identified the appellant who was present before the trial court. He also identified the muddamal article No.1 which was shown to him during his deposition. Thus, this witness, P.W.6, Ajitbhai Laljibhai Gameti Exh.24, has corroborated completely the evidence of two police witnesses. This witness, who is of another department other than the Police Department, had no reason to depose against the appellant. His evidence is corroborated by contemporaneous documents Exh.17 and Exh.25.

13.1 Shri D.M. Shah has argued that this witness, P.W.6, Ajitbhai Laljibhai Gameti Exh.24, has deposed nothing about compliance of Section 50 of the NDPS Act. He has further argued that, had Nanjibhai complied with the provisions of Section 50 of the NDPS Act, this witness would have deposed with regard to compliance of Section 50 of the NDPS Act. It may be noted that this witness was called not as a member of the raiding party. He was called merely for the purpose of conducting preliminary examination of the substance which might be found from the person as per the information received by Nanjibhai and, therefore, it cannot be expected from him that he should have deposed for compliance of Section 50 of the NDPS Act. The contention of Shri D.M. Shah on this point is devoid of any merits and is, therefore, rejected.

13.2 Shri D.M. Shah has argued that, in this case,

the prosecution has examined P.W.5 Virendra Sukhlal (gold-smith), Exh.23, who weighed the contraband article at the place of the raid. According to the case of the prosecution, one Police Constable, Haresh, was sent to call a gold-smith, and, at the request of Haresh, this witness had come to the place of raid where he weighed the contraband article. It is also the case of the prosecution that, after weighing the article, this witness issued the certificate Exh.20. It is also the case of the prosecution that, on weighing the contraband article found from the appellant, it was found that it was weighing 1350 milligram. This witness has not supported the case of the prosecution, and he was declared hostile. According to him, he weighed the article at the Police Station. He admits that the substance, which he weighed, was brown coloured powder which was there in one small paper packet. He admits that he had issued the certificate Exh.20. He also admits his signature on the certificate Exh.20. This witness is examined on the point with regard to article weighed in presence of the panch witnesses. Shri D.M.Shah has argued that P.W.5 Virendra Sukhlal had not deposed on the point with regard to compliance of Section 50 of the NDPS Act. It may be stated that this witness was called for the work with regard to weighing of article only, and not for any other purpose. Shri D.M. Shah has further argued that the evidence of P.W.5 Virendra Sukhlal (gold-smith), Exh.23, is not trust-worthy because, according to him, as and when the need arises, he is called by the police and he used to sign at the instance of the police. This witness has not supported the case of the prosecution and, merely because this witness has deposed as above, the whole prosecution case cannot be discarded.

13.3 Shri D.M. Shah has further argued that the main raiding officer, Nanjibhai Ramjibhai Pargi, had expired before commencement of the trial and, therefore, the complaint Exh.10 is not duly proved by the prosecution and it cannot be taken into consideration by the Court. The learned Judge of the trial court has, rightly, considered the provision of Section 32(2) of the Evidence Act and admitted this complaint Exh.10 in evidence. The prosecution has, by examining two police constables who accompanied Nanjibhai throughout the raid and search, produced and proved all the relevant documents with regard to compliance of provisions of the NDPS Act including Section 50. Shri D.M. Shah has also placed reliance on the judgment of the Supreme Court in the case of Jagdish vs. State of Maharashtra, reported in AIR 2002 Supreme Court 2540. In that case, the panch

witnesses did not support the case of prosecution with regard to search of driver and conductor of the bus. In that case, the appellant was travelling in a bus alleged to be carrying opium in his attachee. The discovery was made by the Narcotics Sub-Inspector who had simply gone to check buses without any prior information and, out of many passengers of the bus, the Sub-Inspector had checked only the appellant and made the discovery. On the basis of the facts and circumstances of that case, the Honourable Supreme Court found that the story given by the Police Inspector was unnatural, and set aside the order of conviction and sentence passed by the trial court and confirmed by the Madhya Pradesh High Court. In the case of Jagdish (supra), no legal position is settled by the Supreme Court and the case is decided on mere facts and circumstances of that case and, therefore, the judgment of the Supreme Court in the case of Jagdish (supra) does not render any assistance to Shri D.M. Shah.

13.4 Shri D.M.Shah has argued that, looking to the facts and circumstances of the case, benefit of doubt should be given to the appellant. We have perused the entire evidence and found that this is not a case in which there is slightest doubt of which the benefit can be given to the appellant.

13.5 Shri D.M.Shah has argued that, looking to Section 50 of the NDPS act, Nanjibhai ought to have first informed the appellant about his right to be searched in the presence of either a Gazetted Officer or a Magistrate and, thereafter, Nanjibhai ought to have given an option by asking him as to whether he wanted to be searched in the presence of either a Gazetted Officer or a Magistrate. He has argued that, in this case, there is no evidence on record to show that the appellant was informed about his right to be searched in the presence of either a Gazetted Officer or a Magistrate. The attention of Shri D.M. Shah was drawn to a reported decision in the case of Joseph Fernandez vs. State of Goa, reported in (2000) 1 SCC 707. In that case, the searching officer informed the appellant, before he was searched, 'if you wish, you may be searched in the presence of a Gazetted Officer or a Magistrate'. The Honourable Supreme Court held that this is in substantial compliance with the requirement of Section 50. Shri D.M. Shah is unable to show any other decision on the point that the accused was required to be informed of, separately, about his right to be searched in the presence of either a Gazetted Officer or a Magistrate.

According to Shri D.M.Shah, the raiding officer ought to have first informed of the appellant about his aforesaid right and then again he was required to be asked as to whether he wanted to be searched in the presence of either a Gazetted Officer or a Magistrate. This is not the requirement of Section 50 of the NDPS Act. We do not agree with the contention of Shri D.M. Shah that there was non-compliance of mandatory provision contained in Section 50 of the NDPS Act.

13.6 Except the aforesaid contentions, learned advocate, Shri D.M. Shah,has not advanced any other arguments with regard to other Sections of the NDPS Act.

14. Though learned advocate, Shri D.M. Shah,has not advanced any argument with regard to other Sections of the NDPS Act, for our satisfaction, we have examined the evidence and we have found that, by producing and proving yadi Exh.14 addressed to the PSO of 'A' Division Police Station, Rajkot, by Nanjibhai, read with station diary Entry No.15 (13.30 hrs) Exh.27, which was made by P.W.7, Ajitsinh Ramsinh, (Police Constable) Exh.26, the prosecution has proved to the satisfaction of the Court that the requirement of Section 42(1) of the NDPS Act with regard to reducing the information in to writing was complied with. By producing and proving yadi (Exh.16) of Nanjibhai addressed to Assistant Police Commissioner,read with letter Exh.30, the prosecution has proved that the requirement of Section 42(2) of the NDPS Act was complied with. By producing and proving Exh.21, which is signed by the appellant, read with Station Diary Entry No.18 (17.10 hrs) Exh.29, the prosecution has proved that the requirement of Section 52(1) of the NDPS Act was complied with. In the present case, Section 52(2) of the NDPS Act is not applicable because the raiding officer had not conducted the raid and search of the appellant on the strength of any warrant obtained from the Magistrate. By producing and proving the report (Exh.11) of Nanjibhai made to the Senior Police Sub-Inspector of 'A' Division Police Station, the prosecution has proved that the requirement of Section 52(3)(a) of the NDPS Act was complied with. From the record, it is proved that, after the raid was carried out, Nanjibhai produced muddamal articles along with custody of the accused to the PSO of the Police Station and, on receipt of the muddamal articles, P.W.9, Bijubha Jilubha, who was Writer Head Constable at the relevant point of time at 'A' Division Police Station, Rajkot, made Entry No.3 in the muddamal register of which a copy is produced at Exh.33, and, therefore, the prosecution has proved that the requirement of Section 52(3)(a) of the NDPS Act was

complied with. Sub-section (b) of Section 52(3) of the NDPS Act, is not applicable to the present case because the raid was carried out by the Authorised Officer as per Section 52(1) of the NDPS Act. As Nanjibhai was attached to 'A' Division Police Station, no separate seal of PSO of the Police Station was required to be affixed on the muddamal article, when it was produced before him and, therefore, the question does not arise for compliance of Section 55 of the NDPS Act. By producing and proving a detailed report Exh.13 of Nanjibhai made to the Assistant Police Commissioner, read with yadi Exh.19, the prosecution has ably proved that the provisions of Section 57 of the NDPS Act were complied with.

15. The complaint was lodged in 'A' Division Police Station, Rajkot, at 16.50 hrs on 17th February 1998. A copy of the First Information Report was sent to the learned Chief Judicial Magistrate, Rajkot, on that very day. It appears from the record that the said copy of the report was received by the learned Chief Judicial Magistrate, Rajkot, at 13.45 hrs on the next day. The copy of the First Information Report contains all the requirements necessary for informing the learned Chief Judicial Magistrate, Rajkot, and, therefore, Section 102(3) of the Code of Criminal Procedure, is also fully complied with.

16. As a result of foregoing discussion, we find that there is no lacuna in the evidence which is led to prove the case against the appellant. The raiding officer, Nanjibhai, had, meticulously, prepared all the relevant documents at the appropriate time for compliance of the relevant provisions of the NDPS Act. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge of the trial court for convicting the appellant. We find no material to take the view contrary to the one already taken by the learned Judge of the trial court. In no case, it can be stated that the judgment impugned in the appeal is erroneous or unsustainable.

17. So far as the impugned judgment of conviction is concerned, it is required to be upheld. We have noticed from the impugned judgment that the learned Judge of the trial Court has convicted the appellant for an offence punishable under Section 21 of the N.D.P.S. Act. For an offence punishable under Section 21 of the N.D.P.S. Act, the learned Judge of the trial Court has inflicted simple imprisonment for 10 years and to pay fine of Rs.1 Lacs and in default of fine to undergo simple imprisonment for one year.

18. If we peruse Section 21 of the N.D.P.S. Act, we find that on offence under Section 21 of the N.D.P.S. Act being proved, the learned Judge of the trial Court had no other option except to inflict rigorous imprisonment. We find in other sections of I.P.C. discretion is being given to the Court to inflict either simple imprisonment or rigorous imprisonment by using the words "of either description for a term which may extend to.....". We find that in Section 21 of the N.D.P.S. Act, the words "either description for a term" are not used and, therefore, herein in this case, the learned Judge of the trial Court has erred in inflicting the simple imprisonment. The learned Judge of the trial Court has inflicted simple imprisonment instead of rigorous imprisonment and, thereby he has committed a serious error which has resulted into miscarriage of justice. We are conscious that the State Government has not preferred any appeal for an enhancement of sentence. We are also conscious that in view of the first proviso just below Clause (e) of Section 386 of Cr.P.C., Appellate Court, in absence of appeal from State for enhancement of sentence, cannot enhance the sentence unless an opportunity of showing cause against such enhancement is given to the accused. Herein this case, only the nature of sentence is required to be changed from the word "simple" to "rigorous". This Court is not going to enhance the sentence. The period of imprisonment will remain same, if nature of sentence is changed. When Section 21 of the N.D.P.S. Act itself does not prescribe the sentence of simple imprisonment, the learned Judge of the trial Court could not have inflicted the sentence of simple imprisonment. He ought to have inflicted rigorous imprisonment instead of simple imprisonment. Looking to this aspect, it can certainly be said that the learned Judge of the trial Court failed to impose a proper sentence. In the case of KODAVANDI MOIDEEN VS. STATE OF KERALA, reported in AIR 1973 SUPREME COURT 467, in para-6, the Hon'ble Supreme Court has held as follows :-

"If a substantial punishment has been given for the offence of which a person is found guilty, after taking due regard to all the relevant circumstances normally there should be no interference by an appellate court. On the other hand, interference will be justified when the sentence is manifestly inadequate or unduly lenient in the particular circumstances of a case. The interference will also be justified when the failure to impose a proper sentence may result in miscarriage of justice."

In view of the above legal position, we are of

the view that by imposing a simple imprisonment which is not prescribed in Section 21 of the N.D.P.S. Act, the learned Judge of the trial Court has not imposed a proper sentence as a result of which miscarriage of justice has resulted in the case. In view of this, this Court is of the view that in exercise of powers conferred on this Court under Section 397 of Cr.P.C., this Court can pass orders, which are necessary to correct, a judicial order of sentence which is ex-facie illegal and not proper in view of Section 21 of the N.D.P.S. Act. Therefore, in exercise of powers conferred on this Court under Section 397 of Cr.P.C. by confirming the judgment of the conviction, this Court deems fit, just and proper to alter the nature of sentence only from "simple imprisonment" to "rigorous imprisonment" and accordingly, the judgment of conviction is upheld but the order of sentence is modified by altering the nature of sentence only from "simple imprisonment" to "rigorous imprisonment". Likewise, sentence of "simple imprisonment" for one year inflicted in default of fine, is also required to be modified because in view of Section 65 of I.P.C. the term of which the Court directs, the offender to be imprisoned in default of payment of a fine shall not extend one-fourth of the term of imprisonment, which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. When the learned Judge of the trial court cannot inflict simple imprisonment for substaintial offence, he cannot inflict simple imprisonment in default of payment of fine. For the sentence required to be inflicted for default of payment of fine, the term of imprisonment for a substantial offence is required to be kept in mind. For an offence punishable under Section 21 of the N.D.P.S. Act maximum substantial sentence which can be inflicted is rigorous imprisonment for 20 years and, therefore, we do not propose to alter the period of imprisonment for default of payment of fine because 1/4th of 20 years would come to five years, but nature of sentence only from "simple imprisonment" to "rigorous imprisonment" is required to be modified for sentence of one year inflicted in default of fine of Rs.1 Lacs.

19. In view of the discussion made hereinabove, the nature of sentence inflicted for default of payment of a fine is also required to be modified to prevent the abuse of process and also to secure the ends of justice. In view of this, the order of sentence is modified by altering the nature of imprisonment only from "simple imprisonment" to "rigorous imprisonment" wherever the words "simple imprisonment" are used in the final order of the judgment challenged in this appeal.

20. In the result, this appeal is devoid of merits

and, therefore, this appeal is dismissed. The conviction of the appellant under Section 235(2) of the Cr.P.C. for an offence punishable under Section 21 of the N.D.P.S. Act, 1985 is confirmed, but at the same time, the nature of sentence is altered from "simple imprisonment" to "rigorous imprisonment" wherever the words "simple imprisonment" are used. Except this little modification, the impugned judgment, Ex.53 dated 9th July, 1999 in Sessions Case No.69 of 1998 is confirmed. The learned Judge of the trial court is directed to dispose of muddamal articles as per the direction given by him in his judgment.

(M.H. Kadri, J.)

(H.H. Mehta,J.)

(swamy)